Supreme Court, U. S.
F I L E D
SEP 2 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-326

ANDREW J. HINSHAW,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JOHN P. McNICHOLAS
MORGAN, WENZEL & McNICHOLAS
A Professional Corporation
1545 Wilshire Boulevard, Suite 800
Los Angeles, California 90017
(213) 483-1961

Attorneys for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. _____

ANDREW J. HINSHAW,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JOHN P. McNICHOLAS
MORGAN, WENZEL & McNICHOLAS
A Professional Corporation
1545 Wilshire Boulevard, Suite 800
Los Angeles, California 90017
(213) 483-1961

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	6
CONCLUSION	16
APPENDIX A	
PETITION FOR HEARING BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA	A-1
APPENDIX B	
ORDER OF FOURTH DISTRICT COURT OF APPEAL DENYING THE PETITION FOR WRIT OF PROHIBITION/MANDAMUS	B-1
APPENDIX C	
ORDER OF CALIFORNIA SUPREME COURT DENYING PETITION FOR HEARING	C-1

TABLE OF AUTHORITIES

Cases	Page
Bruce David McAllister v. State of California, docket No. 75-6875	4
Coleman v. Alabama, 399 U.S. 1 (1969)	13, 14, 15
Fitts v. Superior Court, 6 Cal. 2d 230 (1936)	8
Johnson v. Superior Court, 15 Cal. 3d 244 (1975)	5, 6, 9, 10, 12, 13
Morissey v. Brewer, 408 U.S. 471 (1972)	13, 14, 15
People v. Duncan, 388 Mich. 489 [201 N.W. 2d 629] (1972)	9
People v. McAllister, 54 Cal. 3d 918 (1976)	6
State v. Good, 10 Ariz. App. 556; 460 P. 2d 662 (1969)	11
State v. Joao, 53 Hawaii 226; 491 P. 2d 1089	11
United States v. Cleary, 265 F. 2d 459	9
United States v. Dionisio, 93 S. Ct. 764 (1973)	10
United States v. Osborne, 350 F. 2d 497 (6th Cir. 1965) aff's. 385 U.S. 323 (1967)	11
U. S. v. Sweig, 316 F. Supp. 1148 (1970)	15
Wood v. Georgia, 370 U.S. 375	8

Constitutions	
California Constitution, Article 1, Section 7(a)	3, 7
United States Constitution Fourteenth Amendment	3, 7

Statutes	
Penal Code,	
Section 72	2, 4
Section 424	2, 4
Section 424(1)	2
Section 484	2
Section 487	2
Section 488	2, 4
Section 504	2, 4
Section 939.7	9

28 U.S.C.
Section 1257(2) 3

Texts

Campbell, Eliminate the Grand Jury,
Journal of Criminal Law and Criminology
Vol. 64 No. 2 (1973) 10

Morse, A Survey of the Grand Jury System
10 Ore. L.Rev. 101 Note 6 8

The National Commission on Law
Observance and Enforcement,
Report on Prosecution (1931) 8

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1976
No._____

ANDREW J. HINSHAW,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner ANDREW J. HINSHAW respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California affirming the judgment of The Honorable Frank Domenichini, judge of the Superior Court in the State of

California for the County of Orange, who refused to hear or decide motions made by Petitioner to dismiss the Amended grand jury indictment, charging that the Petitioner committed the following offenses under the Penal Code of the State of California, to wit, violation of Penal Code §72, fraudulent claim; Penal Code §424, embezzlement and falsification of accounts by public officers, misappropriation; Penal Code §424(1), misappropriation; Penal Code §484, theft; Penal Code §487, grand theft; Penal Code §488, petty theft; and Penal Code §504, fraudulent appropriation.

OPINION BELOW

The Supreme Court of the State of California denied a Petition for Hearing to review the order of the Superior Court of the State of California for the County of Orange which denied the motion to dismiss the amended grand jury indictment. A Petition for Writ of Prohibition/Mandamus to dismiss the indictment was made to the Fourth District of the Court of Appeal of the State of California, and was summarily denied.

JURISDICTION

The Petition for Hearing in the Supreme Court of California was denied on August 25,

1976, and is annexed hereto as Appendix "A."

The order of the Fourth District of the Court of Appeal of the State of California denying the Writ of Prohibition/Mandamus is annexed hereto as Appendix "B."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

No application for an extension of time to file this petition has been sought.

QUESTIONS PRESENTED

Whether, considering the empowering statute of the State of California to create and hold Grand Jury sessions, Petitioner has been denied his constitutional rights of due process and equal protection by the inherent structure of the Grand Jury System and because he was deprived of a post-indictment preliminary hearing or examination.

Whether, Petitioner was deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the Federal Constitution or under Article 1, §7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the Petitioner.

Petitioner also directs the Court's attention to the case of Bruce David McAllister against the State of California, docket No. 75-6875, wherein similar questions were raised by Petitioner McAllister, who is presently awaiting an order from this Honorable Court, either granting or denying his writ of certiorari.

STATEMENT OF THE CASE

Petitioner is currently a Member of Congress for the 40th Congressional District in California. From 1965, until his election to Congress in 1972, Petitioner served as elected Assessor of Orange County. In 1974, while running for re-election for Congress the grand jury investigated activities for the Assessor's office during Petitioner's 1972 campaign. On December 11, 1974, nine members of the Assessor's office were indicted for working on Petitioner's 1972 campaign on County time. Further grand jury hearings were held and on May 6, 1975, an amended indictment was filed which added Petitioner as a defendant and which added counts by which Petitioner was charged with conspiracy and violations of Penal Code sections 72 (Fraudulent Claim), 424 (Embezzlement and Falsification of Accounts by Public Officers; Misappropriation), 424 (Grand Theft), 488 (Petty Theft), and 504 (Fraudulent Appropiation). On May 8, 1975, Petitioner was arraigned and on May 29, 1975, Petitioner entered a plea of not guilty.

The matter is presently set to be tried by jury on August 31, 1976.

At no time did Petitioner receive a post-indictment preliminary hearing. Admittedly, Petitioner did not request or demand such a hearing for the following reasons: (1) Requests made by the other defendants named in the same amended indictment with Petitioner were summarily denied by Superior Court; (2) To the best of Petitioner's information and belief no trial court in the State of California had ever afforded a post-indictment preliminary hearing; and, (3) It was incumbent upon the Superior Court, not Petitioner, to provide Petitioner with a post-indictment hearing or examination. Petitioner never waived his rights under either the federal or state Constitutions to a post-indictment preliminary hearing. At no time did the Superior Court or the Real Party in Interest advise Petitioner that he was entitled to a post-indictment preliminary hearing under the federal or state Constitutions.

On June 21, 1976, Petitioner filed a pretrial motion to dismiss the amended indictment on the ground that he had been denied his constitutional right to due process of law when the district attorney failed to inform the grand jury of exculpatory evidence, as required by Johnson v. Superior Court, 15 Cal. 3d 244 (1975). The exculpatory evidence of which the district attorney had knowledge was the consent by the County of Orange to the activities in the Assessor's office which led to the indictment

and then to the amended indictment.

The motion to dismiss was denied by the Superior Court on July 26, 1976, on the ground that People v. McAllister, 54 Cal.3d 918 (1976), prevented the court from hearing Petitioner's motion to dismiss on its merits. People v. McAllister, supra, held that Johnson v. Superior Court, supra, is not retroactive.

The Petition for Writ of Prohibition/ Mandamus was denied without opinion by the Fourth District of the Court of Appeal on July 27, 1976.

The Petition for Hearing in the Supreme Court of the State of California was denied on August 30, 1976.

REASON FOR GRANTING THE WRIT

This case presents the crucial questions of whether the Grand Jury System as utilized in the State of California is inherently violative of the constitutional guarantees of due process and equal protection of law. More specifically it raises the question of whether, under the circumstances and facts of this case, Petitioner was deprived of his constitutional rights to due process and equal protection of the law. Petitioner asserts that this case vividly illustrates and once again resounds the alarm beckoning the courts for judicial reform of a

system which flies in the face of the due process and equal protection clauses of the federal and state Constitutions, i.e., the Grand Jury System which historically served as a bulwark, standing solidly between the ordinary citizen and an overzealous prosecutor. Moreover, that the due process and equal protection clauses of the federal and state Constitutions require the judiciary to enforce restraints upon prosecutors who choose to utilize the Grand Jury indicting process, to insure that the independence of that body is assured; that prosecutors be compelled to disclose to the Grand Jury all evidence relevant and material to the charge(s) against an accused and that the failure of the district attorney to do so in this case deprived Petitioner of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, §7(a) of the California Constitution.

THE INSTITUTION KNOWN AS THE GRAND JURY IS NO LONGER EFFECTIVE IN PROTECTING INDIVIDUALS AGAINST ARBITRARY AND IMPROPERLY MOTIVATED PROSECUTIONS.

Historically, the grand jury has been looked upon as a suitable device for protecting the weak or unpopular from judicial harassment or politically motivated prosecutions. The grand jury system is a product of the common

law. (Fitts v. Superior Court, 6 Cal. 2d 230, 240 (1936).) The grand jury is supposed to function as a body of neighbors who aid the state in bringing criminals to justice while protecting the innocent from unjust accusation. (Wood v. Georgia, 370 U.S. 375, 390 (1962).) However, of the numerous studies undertaken in this country to assess the efficacy of the grand jury, all have concluded that it is no longer effective in protecting individuals against arbitrary prosecutions, and that it no longer exercises the independent judgment required by due process. The late Senator Wayne Morse conducted a landmark study which concluded:

> "Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney. At best the grand jury tends to duplicate the work of the committing magistrate and prosecutor." Morse, A Survey of the Grand Jury System, 10 Ore L. Rev. 101 note 6, at 363.

The National Commission on Law Observance and Enforcement in its Report on Prosecution (page 124 (1931)), concluded similarly, stating:

> "The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the

> dictates of his own sense of propriety and justice. [It] has ceased to perform or to be needed for the function for which it was established."

The lofty esteem which has previously been accorded the grand jury by the courts has also recently degenerated. The 2nd Circuit recently described the grand jury as basically "a law enforcement agency." United States v. Cleary, 265 F. 2d 459, 461 (1959). The Supreme Court of Michigan although avoiding what was characterized as "serious questions of equal protection and due process" recently held that the present system "denied to the accused indicted by a multiple-man grand jury what has become recognized as a fundamental right in most criminal cases--the right to a preliminary examination." (People v. Duncan, (1972) 388 Mich. 489 [201 N.W. 2d 629, 635]). The California Supreme Court also recognized some of the short-comings of the grand jury to learn of and obtain exculpatory evidence, and consequently, the court held "that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 (California Penal Code) to inform the grand jury of its nature and existence..." (Johnson v. Superior Court, 15 Cal. 3d 248, 255 (1976).) This remedy was described by Justice Mosk in his concurring opinion as:

> "...a mere analgesic to ease the procedural pain instead of probing

> the need for substantive corrective surgery.... [T]he majority's palliative measure does not eliminate our obligation to deal with constitutional considerations. Rather, ...the present case is a vivid illustration of the intrinsic constitutional infirmity in the grand jury's indicting function as presently exercised in California. (Justice Wright and Tobriner, concurring, Johnson, supra, at 255-256.)

William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, recently recommended that the grand jury be completely eliminated and replaced by a procedure encompassing an advisory preliminary examination before a judicial officer to determine probable cause. See Campbell, "Eliminate the Grand Jury," Journal of Criminal Law and Criminology, Vol. 64, No. 2 page 174 (1973).

Finally, it should be noted that even this court after almost 200 years of unquestioned support has acknowledged that:

> "The Grand Jury may not always serve its historical role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, (1973) 93 S.Ct. 764, 773.

The impetus behind all of this criticism is the awareness that grand juries today are more dependent on the prosecutor for their successful operation than ever before. Indeed, grand juries normally hear only those cases presented by the prosecutor and only the prosecution's side of the case. He is the party responsible for securing the attendance of witnesses whom he selects, and also for the presentation of other evidence. He conducts the examination of the witnesses, instructs the grand jurors as to what laws are alleged to have been violated, and draws the indictment. As a public official and lawyer, the prosecutor also commands considerable respect from the lay persons constituting the grand jury. Thus, the danger arises that the prosecutor will be able to prejudice and even manipulate the grand jurors and thereby obtain indictments which, under "neutral" conditions, would not normally be issued. The conduct of the prosecutor may take several forms and may occur at different stages in the indictment process. It may, for example, occur through the use of abusive language used by the prosecutor in discussing the character of the accused. See, State v. Good, (1969) 10 Ariz. App. 556; 460 P.2d 662. Or perhaps the prosecutor will unduly compliment the credibility of his own witness. See, State v. Joao, (1971) 53 Hawaii 226, 491 P.2d 1089. The prosecution may also attempt to create preindictment publicity in the hope of inflaming public sentiment and thereby reaching prospective grand jurors. See, United States v. Osborne, 350 F.2d 497 (6th Cir. 1965) aff's. 385 U.S. 323 (1967). The danger

may be even more apparent in cases where the accused is a public official or public figure and the prosecutor is using the grand jury to further his own political ends. However, it may also arise where the prosecutor's performance is judged by the number of indictments or convictions he returns.

Consequently, Petitioner asserts that if we are to breed new life into the historical assumption of neutrality which underlies the grand jury process it will be encumbent upon this court to adopt a procedure which will balance the grand jury process with the need for due process and equal protection safeguards. The only feasible and reliable cure available is to allow every indicted defendant a post-indictment preliminary hearing as a matter of right.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT ALL INDICTED DEFENDANTS RECEIVE A POST-INDICTMENT PRELIMINARY HEARING OR EXAMINATION.

At this point Petitioner would ask the court to take judicial notice of the argument set forth in the concurring opinion by Justice Mosk (concurred in by Justice Wright) and in separate concurring opinion of Justice Tobriner in Johnson v. Superior Court, 15 Cal. 3d 244, 255-270 (1975),

for said argument is the strongest possible one that Petitioner can make.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL AND CALIFORNIA CONSTITUTIONS REQUIRE THE JUDICIARY TO ENFORCE RESTRAINTS UPON PROSECUTORS WHO SEEK INDICTMENTS VIA GRAND JURY AND TO COMPEL DISCLOSURE TO THE GRAND JURY OF THE NATURE AND EXISTENCE OF EVIDENCE REASONABLY TENDING TO NEGATE GUILT.

In light of Coleman v. Alabama, (1969) 399 U.S. 1, and Morrissey v. Brewer, (1972) 408 U.S. 471 and their progeny, the traditional argument that the grand jury merely determines whether probable cause exists to bind an accused over for trial can no longer be considered as valid reasoning for the avoidance of due process and equal protection safeguards during the grand jury process. In Coleman, supra, this Court concluded that the preliminary hearing is a critical stage of the criminal process at which the accused is entitled to the guiding hand of counsel. Id. at 10.

Thus, as so amply stated by Justice Mosk in his concurring opinion in Johnson, supra, "The conclusion is inescapable that if a preindictment

proceeding (as was the case in Coleman) is a critical stage of the criminal justice process requiring due process safeguards, a fortiori the indictment proceeding itself is a critical stage." Id. at 263.

This Court in Morrissey v. Brewer, supra, recognized the due process rights of parolees at prerevocation hearings, mandating that two separate hearings be held prior to parole revocation. The first hearing is designed to determine whether probable cause exists to believe the parolee has violated a condition of parole; the second is the formal revocation hearing. Furthermore, the court stated that the minimum requirements of due process in revoking parolee include (a) written notice of claimed violation; (b) disclosure to parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body such as a traditional parole board and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

If due process requires these various procedural protections in preliminary and parole revocation hearings and since there is no basis for differentiating the rights which should be accorded an individual who is brought to trial via indictment rather than by information, then it follows that equal if not greater safeguards should be invoked in order to protect the liberty

of a prospective indictee.

The requirement that a district attorney who seeks an indictment be obligated to inform the grand jury of the nature and existence of evidence reasonably tending to negate guilt when compared to the procedural safeguards observed by this Court in Coleman, supra, and Morrissey, supra, seems quite modest. The prospective indictee has no right to appear either in person or by counsel before the grand jury. He has no right to produce witnesses or evidence on his own behalf. Nor is he given the opportunity to confront or cross-examine adverse witnesses. In short, any rights which a prospective indictee may have are placed upon the shoulders of his accuser, to wit, the district attorney:

> "...it can hardly be doubted now that prosecutors must observe some limits of essential fairness in their work with such investigating bodies." United States v. Sweig, 316 F.Supp. 1148, 1153 (1970).

Now is the time to impose proper restraints upon the prosecutor to guarantee true neutrality of our Grand Jury System. And of these restraints, the first and most essential is the minimal procedural safeguard of requiring that a prosecutor disclose all relevant and material exculpatory evidence to the Grand Jury. And, where the trial judge, on review of the Grand Jury proceedings, discovers

nondisclosure, the charges should be summarily dismissed.

CONCLUSION

Under these circumstances and for the reasons set forth above, Petitioner respectfully submits that this Court should grant this Petition for Certiorari in order that it can be decided once and for all whether the Grand Jury System is inherently violative of the Constitutional guarantees of due process and equal protection and whether under these circumstances, the Petitioner was deprived of his rights to due process and equal protection of the law.

DATED: August 31, 1976.

Respectfully submitted

MORGAN, WENZEL & McNICHOLAS

JOHN P. McNICHOLAS

Attorneys for Petitioner

1545 Wilshire Blvd.
Suite 800
Los Angeles, CA 90017
(213) 483-1961

APPENDIX A

SUPREME COURT
FILED
JUL 30 1976
G.E.BISHEL, Clerk

No. 4th Civil No. 17203

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA

ANDREW J. HINSHAW,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, CECIL HICKS, DISTRICT ATTORNEY FOR ORANGE COUNTY
Real Party in Interest

PETITION FOR HEARING
AND APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK DOMENICHINI JUDGE

JOHN P. McNICHOLAS
Morgan, Wenzel &
McNicholas
Professional Corporation
1545 Wilshire Boulevard
Suite 800
Los Angeles, California 90017
(213) 483-1961

Attorneys for Petitioner
ANDREW J. HINSHAW

4th Civil No.
17203

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANDREW J. HINSHAW,

Petitioner

vs.

THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE
ORANGE,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA
BY THEIR ATTORNEY, CECIL HICKS,
DISTRICT ATTORNEY FOR ORANGE COUNTY,

Real Party in Interest

PETITION FOR HEARING
AND APPLICATION FOR STAY OF TRIAL SET
FOR AUGUST 4, 1976

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK DOMENICHINI JUDGE

JOHN P. McNICHOLAS
Morgan, Wenzel &
McNicholas
Professional Corporation
1545 Wilshire Boulevard,
Suite 800
Los Angeles, California 90017
(213) 483-1961

Attorneys for Petitioner
ANDREW J. HINSHAW

TOPICAL INDEX

Table of Authorities 6

STATEMENT OF CASE. 11

ISSUES RAISED BY PETITION 13

REASONS WHY THIS PETITION SHOULD BE GRANTED. 14

1. The Due Process and Equal Protection Clauses of the State and Federal Constitutions Require That All Indicted Defendants Receive A Post-Indictment Preliminary Hearing or Examination 14

2. The Due Process and Equal Protection Clauses of the State and Federal Constitutions Require That When a District Attorney Seeks An Indictment He Is Obligated To Inform the Grand Jury of the Nature and Existence of Evidence Reasonably Tending to Negate Guilt. 16

APPLICATION FOR TEMPORARY STAY OF PROCEEDING 18

DECLARATION IN SUPPORT OF APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976 19

APPENDIX B-1

TABLE OF AUTHORITIES

CASES — Page

Fuentes v. Shevin (1972) 407 U.S. 1983 — 15

Gee V. Brown (1975) 14 Cal.3d 571 — 15

In Re Ferguson (1971) 5 Cal.3d 525 — 16

Johnson v. Superior Court (1975) 15 Cal.3d 244 — 14, 17

Morrissey v. Brewer (1972) 408 U.S. 471 — 15

People v. Barbara (1974) 390 Mich. 377, 214 N.W. 2d 833 — 14

People v. Duncan (1972) 388 Mich. 489, 201 N.W. 629 — 14

People v. McAllister (1976) 54 Cal.App.3d 918 — 12

Screws v. United States (1945) 325 U.S. 91 — 15

Suhay v. United States (10 Cir., 1938) 95 F.2d 890 — 15

U.S. v. Wade (1967) 388 U.S. 218 — 15

Wolff v. McDonnell (1974) 418 U.S. 539 — 15

STATUTES — Page

California Penal Code

Section 72 — 11
Section 424 — 11
Section 424(1) — 11
Section 484 — 11
Section 487 — 11
Section 488 — 11
Section 504 — 11
Section 682 — 16
Section 939.7 — 17

United States Constitution

Fourteenth Amendment — 14
Sixth Amendment — 17

California Constitution

Article 1, Section 7(a) — 9, 10, 13, 14
Article 1, Section 8 — 16

4th Civil No.
1 7 2 0 3

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANDREW J. HINSHAW,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, CECIL HICKS, DISTRICT ATTORNEY FOR ORANGE COUNTY

Real Party in Interest

PETITION FOR HEARING

TO DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, ANDREW J. HINSHAW, respectfully Petitions this Honorable Court for an order transferring the within cause to itself

for hearing and decision on the grounds that it is necessary for the settlement of important questions of law; and, upon such hearing and decision, for an order dismissing the amended indictment against ANDREW J. HINSHAW below.

The Court of Appeal for the Fourth Appellate District, Division Two (San Bernardino) denied a Petition for Writ of Prohibition/Mandamus and Application for Stay of All Proceedings on Tuesday July 27, 1976. A true copy of such order is attached hereto as an Appendix.

The two important questions of law presented by this Petition are:

1. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution because he did not receive a post-indictment preliminary hearing or examination?

(a) Was petitioner required to make a request for a post-indictment preliminary hearing when the requests by other defendants had been denied?

(b) Is it incumbent upon the respondent court to sua sponte provide for a post-indictment preliminary hearing?

2. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the petitioner?

Therefore petitioner now requests that this Court accept jurisdiction of this case for the purpose of declaring: (1) That the due process and equal protection clauses of the federal and state Constitutions require that all indicted defendants receive post-indictment preliminary examination; and, (2) That when the district attorney presents a case to the grand jury for indictment the equal protection and due process clauses of the state and federal Constitutions require the district attorney to inform the grand jury of the nature and existence of evidence tending to negate the guilt of the accused.

STATEMENT OF THE CASE

Petitioner is currently a Member of Congress for the 40th Congressional District in California. From 1965 until his election to Congress in 1972, petitioner served as elected Assessor of Orange County. In 1974, while running for re-election for Congress the grand jury investigated activities for the Assessor's office during petitioner's 1972 campaign. On December 11, 1974, nine members of the Assessor's office were indicted for working on petitioner's 1972 campaign on County time. Further grand jury hearings were held and on May 6, 1975, an amended indictment was filed which added petitioner as a defendant and which added counts by wich petitioner was charged with conspiracy and violations of sections 72, 424, 424(1), 484, 487, 488 and 504 of the Penal Code. Petitioner was arraigned and entered a plea of not guilty. The matter was set for trial which has now been "trailed" to Wednesday, August 4, 1976 in Department 20 of the Orange County Superior Court in order for petitioner to present this Petition to the Supreme Court.

At no time did petitioner receive a post-indictment preliminary hearing. Admittedly, petitioner did not request or demand such a hearing: (1) Requests made by the other defendants named in the same amended indictment with petitioner were summarily denied by the respondent court; (2) To the best of petitioner's information and belief no trial court in the State of California including respondent court, has ever

afforded a post-indictment preliminary hearing; and, (3) It is incumbent upon the respondent court, not petitioner, to provide petitioner with a post-indictment prelminary hearing or examination. Furthermore, petitioner has never waived his rights under either the federal or state Constitutions to a post-indictment prelminary hearing under the federal or state Constitutions.

Petitioner's motions to dismiss the amended indictment came on for hearing before the Honorable Frank Domenichini in Department 20 of the respondent court on July 26, 1976. Respondent court ruled that the holding in People v. McAllister (1976) 54 Cal. 3d 918, prevented respondent court from hearing or deciding petitioner's motion to dismiss the amended indictment on its merits; i.e., that petitioner was deprived of his Constitutional rights when the district attorney failed to inform the grand jury of the nature and existence of exculpatory evidence.

The exculpatory evidence of which the district attorney had knowledge was the consent by the County of Orange to the activities in the Assessor's office which led to the indictment and then to the amended indictment.

On July 27, 1976, petitioner filed a Petition for Writ of Prhohibition/Mandamus and Application for Stay of All Proceedings in the Fourth District of the Court of Appeal, Division Two (San Bernardino), wherein petitioner raised the identical issues that are presented by this

petition. The petition was denied without an opinion on the same day.

ISSUES RAISED BY THIS PETITION

The Supreme Court should stay the trial set August 4, 1976, in order to resolve these two important questions of law:

1. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution because he did not receive a post-indictment preliminary hearing?

   (a) Was petitioner required to make a request for a post-indictment preliminary hearing when the requests of other defendants had been denied?

   (b) Is it incumbent upon the respondent court to sua sponte provide for a post-indictment preliminary hearing?

2. Was petitioner deprived of equal protection of laws or of due process

of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the petitioner?

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. The due process and equal protection clauses of the state and federal Constitutions require that all indicted defendant's receive a post-indictment preliminary hearing or examination.

The strongest possible argument that petitioner can make in support of this point is set forth in the concurring opinion by Justice Mosk (concurred in by Chief Justice Wright) and in the separate concurring opinion of Justice Tobriner in Johnson v. Superior Court (1975) 15 Cal. 3d 244, §55-270.

The case of People v. Duncan (1972) 388 Mich. 489 [201 N.W. 629, 635] cited by Justice Mosk in Johnson, supra, at page 257, was followed in People v. Barbara (1974) 390 Mich.

377 [214 N.W. 2d 833] wherein it was held that a felony defendant charged by grand jury indictments was entitled to a preliminary hearing and that a misdemeanor defendant charged by grand jury indictment was likewise entitled.

By granting the relief sought by this petition, those accused of felonies by grand jury indictment would have the same Constitutional rights as a suspect in a lineup (U.S. v. Wade (1967) 388 U.S. 218), as a parolee charged with parole violations (Morrissey v. Brewer (1972) 408 U.S. 471,) as a prison inmate at a disciplinary hearing (Wolff v. McDonnell (1974) 413 U.S. 539), and, as a parolee at a parole recission hearing (Gee v. Brown (1975) 14 Cal. 3d 571), thereby affecting a long overdue reform of the grand jury's indicting process.

Petitioner's failure to make a demand for a post-indictment preliminary hearing which had never been granted in the history of California jurisprudence, and which, when it was demanded by petitioner's co-defendants, was summarily refused, will not defeat petitioner's claim here that petitioner was constitutionally entitled to such a hearing before a magistrate. (See Screws v. United States (1945) 325 U.S. 91, and Suhay v. United States, 10 Cir, 1938, 95 F2d 890.) The courts indulge in every reasonable presumption against waiver of procedural due process rights. (Fuentes v. Shevin, Fla. (1972) 407 U.S. 1983.)

2. The due process and equal protection clauses of the state and federal Constitutions require that when a district attorney seeks an indictment he is obligated to inform the grand jury of the nature and existence of evidence reasonably tending to negate guilt.

Petitioner is entitled to a constitutionally conducted grand jury proceeding. The superior court has no jurisdiction to proceed with a felony trial unless a valid indictment has first been presented. (Cal. Const., Art. I, Section 8; Penal Code Section 682). By with holding the exculpatory evidence from the grand jury, the district attorney frustrated the grand jury proceeding from being Constitutionally conducted thereby depriving petitioner of equal protection and due process.

The prosecutor is under a duty not to conceal or suppress evidence negating guilt. Intentional suppression of material evidence denies a fair trial and under many circumstances he must disclose exculpatory evidence even without a request. (See in Re Ferguson (1971) 5 Cal. 3d 525.) By analogy if the prosecutor is Constitutionally required to disclose exculpatory evidence to his adversary at the time of trial, no less stringent requirement should be imposed where he is presenting evidence against a potential indictee before the grand jury. In each example the concealment of exculpatory evidence is repugnant to the concepts of fairness implicit in

the equal protection and due process clauses of the federal and state Constitutions.

Finally, if the prosecutor is expected to produce exculpatory evidence as well as incriminating evidence before the grand jury, which side does he emphasize? Which position does he advocate? It would appear that there is also a serious question involving the right of both sides to effective and competent counsel as required by the Sixth Amendment of the federal Constitution. Such an apparent irreconcilable conflict of interests might be resolved by allowing persons appearing before the grand jury to appear with their own attorneys and allow cross examination. An alternative is the post-indictment preliminary hearing or examination discussed above.

If due process is truly this flexible concept that we have been taught that it is and that it has to do with the denial of "fundamental fairness, shocking to the universal sense of justice", then concealment of exculpatory evidence from the grand jury certainly goes further then merely violating Penal Code Section 939.7 as held by the majority in Johnson v. Superior Court (1975) 15 Cal. 3d 248, and clearly violates the concept of due process.

Respectfully Submitted

MORGAN, WENZEL & McNICHOLAS
Professional Corporation

JOHN P. McNICHOLAS

APPLICATION FOR TEMPORARY STAY OF PROCEEDINGS

It is hereby requested that trial be stayed in the matter of People of the State of California Plaintiff, vs. Andrew J. Hinshaw, Defendant, Orange County Superior Court Case No. C 33269. The trial has been "trailed" until Wednesday, August 4, 1976, before Honorable Frank Domenchini, Department 20, Orange County Superior Court, at which time jury selection is scheduled to commence.

A stay of all proceedings including the trial in this case is necessary in order to permit this Court to rule on the two important questions of law presented by the within petition which is incorporated herein by reference.

This application is based upon the declaration of John P. McNicholas and upon the petition for hearing, all filed herein.

Dated: July 29, 1976

Respectfully Submitted

MORGAN, WENZEL & McNICHOLAS
Professional Corporation

John P. McNicholas
JOHN P. McNICHOLAS

DECLARATION IN SUPPORT OF APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976

I John P. McNicholas declare:

I am an attorney licensed to practice law in the State of California.

I represent the petitioner herein.

Petitioner's jury trial is currently scheduled to begin on Wednesday, August 4, 1976, at 10:00 a.m. in Department 20 of the Orange County Superior Court before the Honorable Frank Domenchini. Trial in this matter has been "trailed" from Wednesday, July 28, 1976 in hopes that this Court will rule upon the issues raised in the petition for hearing filed herewith. However, if this Court does not stay the trial as presently scheduled, the respondent court will proceed to trial in this matter and if this Court has not ruled on the issues raised in the within Petition for Hearing before the time set for trial, petitioner will be forced to proceed to trial in violation of his rights under the federal and state Constitutions all as more fully set forth in the within Petition for Hearing.

If trial is held as scheduled on August 4, 1976 prior to a ruling by this Court, it will also result in needless expenditure and inconvenience in the event that this Court later grants the relief prayed for in the within Petition for Hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1976, at Los Angeles, California.

John P. McNicholas
JOHN P. McNICHOLAS

PROOF OF SERVICE

I am a citizen of the United States and a resident of Los Angeles County. I am over the age of 18 years and not a party to the within action. My office address is 1545 Wilshire Boulevard, Suite 800, Los Angeles, California 90017.

On July 29, 1976, I served the within PETITION FOR HEARING AND APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976, on the below named parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereof fully pre-paid, in the United States mail at Los Angeles, California, addressed as follows:

Fourth Appellate District, Court of Appeal
640 State Bldg.,
303 W. 3rd Street
San Bernardino, California 92401

Evelle Younger, Attorney General
Bank of American Plaza
110 West A Street
Suite 600
San Diego, California 92101

Hon. Frank Dominichini
Judge of Superior Court
34 Civic Center Plaza
Santa Ana, California 92701

Cecil Hicks, District Attorney for Orange County
Courthouse
Post Office Box 808
Santa Ana, California 92702

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1976, at Los Angeles, California

Craig Winterman

Craig L. Winterman

APPENDIX B

RECEIVED
JUL 29 1976
MORGAN, WENZEL &
McNICHOLAS

COURT OF APPEAL-STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION TWO

ANDREW J. HINSHAW, 4 Civ.
NO 17203
Petitioner,
vs. COUNTY NO C-33269

SUPERIOR COURT, ORANGE COUNTY
Respondent,
and
PEOPLE,
Real Party in Interest

BY THE COURT:

The petition for writ of prohibition/ mandate is DENIED.

COPY

Kaufman, J.
Acting P.J.

Court of Appeal-Fourth Dist.
FILED
JUL 27 1976
Ervin J. Tuszynski, Clerk

Deputy Clerk

Copies to:_____

County Clerk, Orange County, Santa Ana
Morgan, Wenzel & McNicholas, Attys.,
1545 Wilshire Blvd., Ste 800,
Los Angeles 90017
Hon. Frank Dominichini, Judge of the
Superior Court, 34 Civic Center
Plaza, Santa Ana, CA 92701
Dist. Atty., Orange County, Santa Ana

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 2 5 1976

I have this day filed Order

HEARING DENIED

ORDER FINAL FORTHWITH

In re: 4 Civ. *No.* 17203

Hinshaw

vs.

Superior Court, Orange

Respectfully,

G. E. BISHEL
Clerk

40748-877 9-75 3M OSP

Supreme Court, U. S.
FILED
NOV 26 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76 - 326

ANDREW J. HINSHAW,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

CECIL HICKS, District Attorney
County of Orange, State of California

MICHAEL R. CAPIZZI
Assistant District Attorney

ORETTA D. SEARS
Deputy District Attorney
Head, Writs and Appeals Section

By: GARY P. RYAN
Deputy District Attorney

Attorneys for Respondent

Office of the
District Attorney
County of Orange:
700 Civic Center Drive West
Santa Ana, Ca. 92701
(714) 834-3600

Dean-Standefer, 326½ Main St., HuntingtonBeach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

Brief for Respondent in Opposition	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Argument	5
I An order of the California Supreme Court denying discretionary intermediate relief is not a "final" judgment reviewable by the Supreme Court of the United States under 28 U.S.C. § 1257	5
II The question as to whether Article 1 § 14 of the California Constitution providing for the initiation of felony prosecutions by either indictment or information and the failure to provide a post-indictment probable cause hearing deprives the petitioner of the equal protection of laws and the due process of law under the Fourteenth Amendment is not properly before the Supreme Court where that question has never been raised in the trial court	9
III The question as to whether the alleged concealment by the District Attorney of exculpatory evidence from the grand jury deprives the petitioner of the equal protection of laws and due process of law under the Fourteenth Amendment is not properly before the Supreme Court	10

TOPICAL INDEX

	Page
Conclusion	13
Index to Appendixes	
Appendixes "A" and "B"	

TABLE OF AUTHORITIES CITED

Cases

Arceneaux v. Louisiana (1964) 376 U.S. 336, 11 L. Ed. 2d 750, 84 S. Ct. 777	8
Cardinale v. Louisiana (1969) 394 U.S. 437, 22 L. Ed. 398, 89 S. Ct. 1162	10
Costarelli v. Massachusetts (1975) 421 U.S. 193, 44 L. Ed. 2d 76, 95 S. Ct. 1534	8
Edelman v. California (1952) 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293	10
Ferguson v. Georgia (1960) 365 U.S. 570, 5 L. Ed. 783, 81 S. Ct. 756	10
Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 136 P.2d 785	7
Greenbery v. Superior Court (1942) 19 Cal. 2d 319, 121 P.2d 713	6
Hulbert v. Chicago (1906) 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617	10
Johnson v. Superior Court (1975) 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792	4, 5, 12

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Laucirica v. Workmen's Comp. Appeals Bd. (1971) 17 Cal. App. 3d 681, 95 Cal. Rptr. 219	7
McAllister (1976) 54 Cal. App. 3d 918, 126 Cal. Rptr. 881	4
Pac. Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 84 Cal. Rptr. 718, 465 P.2d 854	6
People v. Egan (1946) 73 Cal. App. 2d 894, 167 P.2d 766	6
People v. Harby (1942) 51 Cal. App. 2d 759, 125 P.2d 814	11
People v. Malich (1971) 15 Cal. App. 3d 253, 93 Cal. Rptr. 87	6
People v. Medina (1972) 6 Cal. 3d 484, 99 Cal. Rptr. 630, 492 P.2d 686	7
People v. Sheuy (1975) 13 Cal. 3d 835, 120 Cal. Rptr. 83, 533 P.2d 211	7
People v. Sirhan (1972) 7 Cal. 3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121, cert. den. 410 U.S. 947	10
People v. Werner (1940) 16 Cal. 2d 216, 105 P.2d 927	10, 11
Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 124 Cal. Rptr. 427	7
Stanson v. Mott (1976) 17 Cal. 3d 206, ... Cal. Rptr. ..... , ... P.2d	11

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
United States v. Calandra (1974) 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613	13
United States v. Dionisio (1973) 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764	13
United States v. Hata (1976) 535 F.2d 508	12
Whitus v. Georgia (1967) 385 U.S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643	8
United States Constitution	
Fourteenth Amendment	2, 3, 5, 9, 10
Statute (United States)	
28 U.S.C. § 1257	2, 5, 7
California Constitution	
Article 1 § 14	2, 3, 9
Article VI § 14	6, 7
Article 11 § 10	11
Article 16 § 6	11, 12
Statutes (California)	
Penal Code	
§ 424	3, 4
§ 484	4
§ 939.7	4
§ 1237	3, 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76 - 326

ANDREW J. HINSHAW,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Supreme Court of the State of California summarily denied a petition for hearing to review the order of the Superior Court of the State of California for the County of Orange which denied the motion to dismiss the amended grand jury indictment. The minute order of the California Supreme Court denying said

petition appears as Appendix "C" to petitioner's Jurisdictional Statement. A Petition for Writ of Prohibition/Mandamus to dismiss said indictment was taken to the Court of Appeal of the State of California, Fourth District, Division Two, and was summarily denied. The minute order of the Court of Appeal denying said petition appears as Appendix "B" to petitioner's Jurisdictional Statement.

JURISDICTION

It is respectfully submitted that the petition in the instant case is not within the jurisdiction of this Court and is not taken in conformity to statute or to the rules of this Court. As discussed hereafter, petitioner's reliance upon 28 U.S.C. § 1257 as purportedly conferring jurisdiction on this Court of certiorari is unwarranted.

QUESTIONS PRESENTED

1. Whether an order by the California Supreme Court denying discretionary intermediate relief is a "final" judgment reviewable by the Supreme Court of the United States under 28 U.S.C. § 1257?

2. Whether the question as to the deprivation of petitioner's constitutional right to due process of law and equal protection of laws under the Fourteenth Amendment by Article 1 § 14 of the California Constitution which provides for the initiation of felony prosecutions by indictment or by information and by the failure to provide

petitioner with a postindictment probable cause hearing is properly before the Supreme Court where that question has never been raised in the trial court?

3. Whether the question as to the deprivation of petitioner's constitutional right to due process of law and equal protection of the laws under the Fourteenth Amendment by the alleged concealment by the District Attorney of exculpatory evidence from the grand jury is properly before the Supreme Court?

STATUTES INVOLVED

Article 1 § 14 of the California Constitution and Section 1237 of the California Penal Code are set forth as Appendix "A" and Appendix "B" respectively.

STATEMENT OF THE CASE

On December 11, 1974, nine members of the Orange County Assessor's office were indicted for violations of the California Penal Code which arose from work performed by them on petitioner's 1972 campaign for a seat in Congress from the 39th Congressional District in California on County time. Further grand jury hearings were held and on May 6, 1975, an amended indictment was filed which added petitioner as a defendant and which added counts by which petitioner was charged with two counts of conspiracy, and violations of Penal Code Section 424 (Embezzlement and Falsification of Accounts by Public

Officers; Misappropriation of Public Monies), and Penal Code Section 484 (Grand Theft). On May 8, 1975, petitioner was arraigned, and on May 29, 1975, petitioner entered a plea of not guilty.

The trial in the matter is presently proceeding. It is anticipated final argument and jury instructions will commence during the week beginning November 22, 1976. This will be the culmination of a trial which has lasted in excess of two months.

On June 21, 1976, petitioner filed a pretrial motion to dismiss the amended indictment on the ground that he had been denied his constitutional right to due process of law when the District Attorney failed to inform the grand jury of alleged exculpatory evidence, as required by the California Supreme Court decision of *Johnson v. Superior Court* (1975) 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792, in its construction of California Penal Code Section 939.7. The alleged exculpatory evidence of which the District Attorney had knowledge was the claimed consent by the County of Orange to the activities in the Assessor's office which were the subject of the indictments returned in the instant case.

At the pretrial motion to dismiss the amended indictment, evidence was taken by the trial court concerning the alleged exculpatory evidence. Parties for both sides urged the trial court to rule on the merits of petitioner's motion to dismiss. The motion to dismiss was denied by the trial court on July 26, 1976, on the ground that *People v. McAllister* (1976) 54 Cal. App. 3d 918, 126 Cal. Rptr. 881, held that *Johnson v. Superior Court, supra,* is not retroactive.

During the trial in the instant matter, petitioner sought to introduce the evidence received during the motion to dismiss the indictment pertaining to the alleged consent. The trial court rejected petitioner's offer of said evidence on the ground of relevance and ruled that the proffered evidence did not show consent.

At no time in the trial court has petitioner moved to quash or object to the indictment on the ground that initiating felony prosecutions by indictment rather than by information deprives petitioner of due process of law and equal protection of the laws under the Fourteenth Amendment. At no time in the trial court has petitioner requested or demanded a postindictment probable cause hearing. The propriety of such a demand was left unanswered by *Johnson v. Superior Court, supra,* at page 270, since the question had not been directly raised and argued by the parties.

On July 27, 1976, petitioner's Petition for Writ of Prohibition/Mandamus was denied without opinion by the Fourth District Court of Appeal.

On August 30, 1976, petitioner's Petition for Hearing in the Supreme Court of California was denied without opinion.

ARGUMENT

I

An Order Of The California Supreme Court Denying Discretionary Intermediate Relief Is Not A "Final" Judgment Reviewable By The Supreme Court Of The United States Under 28 U.S.C. § 1257.

Under California procedure, a defendant is not entitled to appeal a ruling made by the trial judge in Superior Court until after a final judgment of conviction [California Penal Code § 1237]. There is no direct appeal from an order denying a motion to set aside an accusatory pleading. The order is reviewable on appeal only from the judgment itself. *Greenbery v. Superior Court* (1942) 19 Cal. 2d 319, 322-323, 121 P.2d 713; *People v. Malich* (1971) 15 Cal. App. 3d 253, 264-265, 93 Cal. Rptr. 87; *People v. Egan* (1946) 73 Cal. App. 2d 894, 897-898, 167 P.2d 766.

The use of the "extraordinary and "prerogative" writs of mandate and prohibition have long been recognized in California to afford appellate review of interim orders of trial courts in cases not yet disposed of by an appealable judgment. [See *Witkin*, California Criminal Procedure (1963) section 788.] Unlike review by appeal, which is a matter of right following a final judgment of conviction, the issuance of "extraordinary" and "prerogative" writs is directed to the "sound" discretion of the reviewing court. *Pac. Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal. 3d 161, 169, 84 Cal. Rptr. 718, 465 P.2d 854.

An order of the California Supreme Court which denies without opinion a petition for interim appellate review by an "extraordinary" writ in lieu of appeal is subject to further review on a subsequent appeal. Such an order is not the determination of a "cause". In determining a "cause" the California Supreme Court and California Courts of Appeal are required by the California Constitution to render a formal opinion. Cal.

Const. Art. VI § 14. A summary denial of a "petition for hearing" without issuance of an order to show cause, without oral argument and without formal opinion is not a decision of a "cause" on its merits. *Funeral Dir. Assn. v. Bd. of Funeral Dirs.* (1943) 22 Cal. 2d 104, 106, 136 P.2d 785.

The order of the California Supreme Court from which petitioner seeks relief by this Court is not a final judgment. Neither the California Supreme Court nor any other California appellate court has decided the questions raised by petitioner in his petition. Under California procedure, petitioner may raise the questions presented in the petition anew upon appeal from a judgment entered by the Superior Court. At such time the parties will have an opportunity to brief and argue the case in full. *People v. Shuey* (1975) 13 Cal. 3d 835, 844-846, 120 Cal. Rptr. 83, 533 P.2d 211; *People v. Medina* (1972) 6 Cal. 3d 484, 490-492, 99 Cal. Rptr. 630, 492 P.2d 686; *Rosato v. Superior Court* (1975) 51 Cal. App. 3d 190, 230-231, 124 Cal. Rptr. 427; *Laucirica v. Workmen's Comp. Appeals Bd.* (1971) 17 Cal. App. 3d 681, 684, 95 Cal. Rptr. 219.

Respondent submits that the order of the California Supreme Court denying petitioner's request for a hearing is not a "final" judgment within the meaning of 28 U.S.C. § 1257, which restricts this Court's jurisdiction to review state court decisions. In petitioner's present procedural posture, he is requesting the Court to grant certiorari to review a decision rendered by the trial court. If certiorari were granted, the appellate courts of California would be deprived of an opportunity to pass upon petitioner's assertions of federal constitutional error.

In *Arceneaux v. Louisiana* (1964) 376 U.S. 336, 11 L. Ed. 2d 750, 84 S. Ct. 777, this Court dismissed a writ of certiorari previously granted to review an order of a Louisiana trial court recalling an order for a preliminary hearing in a vagrancy case. The petitioner in *Arceneaux* sought review of that order by seeking certiorari from a denial of intermediate relief by the Louisiana Supreme Court. As in California, Louisiana procedures permitted appeals only from orders which finally disposed of criminal cases. This Court held:

> "The ruling complained of as referred to by the Louisiana Supreme Court can only be the order recalling the order for a preliminary hearing. Under our decisions in the criminal field, such denial of intermediate relief in state criminal cases is similar to an order overruling a plea in bar (*Eastman v. Ohio*, 299 U.S. 505, 81 L. Ed. 374, 57 S. Ct. 21) or overruling a demurrer to an indictment (*Polakous Realty Experts v. Alabama*, 319 U.S. 750, 87 L. Ed. 1705, 63 S. Ct. 1155). Hence under 28 U.S.C. § 1257, denial of the preliminary hearing in a vagrancy case of this nature is not a 'final' judgment." 376 U.S. at 338.

Similarly, in *Whitus v. Georgia* (1967) 385 U.S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643, this Court held that the question of whether a grand jury was discriminatorily selected was reviewable after conviction from a decision of the Georgia Supreme Court affirming the conviction, but not after an interlocutory appeal authorized by state law.

More recently, in *Costarelli v. Massachusetts* (1975) 421 U.S. 193, 44 L. Ed. 2d 76, 95 S. Ct. 1534, the appellant took

an appeal to this Court without first initially seeking a full review of his federal constitutional claim in the state court. This Honorable Court found lack of jurisdiction since there had been no decision sought or rendered by the highest state court in Massachusetts in which a decision could be had.

In the case at bar, petitioner can obtain state appellate review of his federal constitutional claim upon proper presentment on appeal. It is respectfully submitted the granting of certiorari would result in the needless interference with state proceedings which are not, as yet, "finally" resolved.

II

The Question As To Whether Article 1 § 14 Of The California Constitution Providing For The Initiation Of Felony Prosecutions By Either Indictment Or Information And The Failure To Provide A Postindictment Probable Cause Hearing Deprives The Petitioner Of The Equal Protection Of Laws And The Due Process of Law Under The Fourteenth Amendment Is Not Properly Before The Supreme Court Where That Question Has Never Been Raised In The Trial Court.

As of this date, petitioner has failed to object in the trial court to an indictment by grand jury as a vehicle for initiating a felony prosecution. Moreover, petitioner has neither claimed he was denied equal protection of laws and due process of law under the Fourteenth Amendment because the prosecution was initiated by indictment rather than information, nor has he requested or demanded a postindictment preliminary examination. Petitioner has failed to take any steps in the trial court

to preserve his claim of federal constitutional error on this question.

Under California procedure a defendant who fails to raise contentions of federal constitutional irregularity in the trial court waives them. Similarly, by failing to raise such contention by objection or motion, a defendant is precluded from making them on appeal. *People v. Sirhan* (1972) 7 Cal. 3d 710, 754-755, 102 Cal. Rptr. 385, 497 P.2d 1121, *cert. den.* 410 U.S. 947.

This Court has consistently held it is without power to decide whether constitutional rights have been violated when the federal questions are not preserved in accordance with state law requirements. Unless it appears on the record that a federal question was both raised and decided in the state court, the appellate jurisdiction of this Court fails. *Cardinale v. Louisiana* (1969) 394 U.S. 437, 22 L. Ed. 398, 89 S. Ct. 1162; *Ferguson v. Georgia* (1960) 365 U.S. 570, 5 L. Ed. 783, 81 S. Ct. 756; *Edleman v. California* (1952) 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293; *Hulbert v. Chicago* (1906) 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617.

III

The Question As To Whether The Alleged Concealment By The District Attorney Of Exculpatory Evidence From The Grand Jury Deprives The Petitioner Of The Equal Protection Of Laws And Due Process Of Law Under The Fourteenth Amendment Is Not Properly Before The Supreme Court.

California generally recognizes the defense of consent in prosecutions for theft. *People v. Werner* (1940) 16 Cal. 2d

216, 224, 105 P.2d 927. Despite this general rule the defense has no application where the theft involves the taking of public monies, since no one has the authority to consent to the taking or use of public funds. In this regard the general rule is that the apparent consent of a person without legal capacity to give the consent is ineffective. (See *Witkin*, California Crimes (1963), § 173, page 165.)

In the instant matter, since the object of the theft is public funds, there is no one who has the authority to consent to their illegal use. *Stanson v. Mott* (1976) 17 Cal. 3d 206, ... Cal. Rptr. ....., ... P.2d .....; *People v. Harby* (1942) 51 Cal. App. 2d 759, 125 P.2d 814.

Article 11 § 10 of the California Constitution provides:

> "A local government body may not grant extra compensation or extra allowances to a public officer, public employee, or contractor after services have been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

Article 16 § 6 of the California Constitution provides in part as follows:

> "The Legislature shall have no power to give or to lend, or to authorize the giving, or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of any person, association, or corporation, whether municipal or otherwise, . . . ; nor shall it have the power to make any gift or authorize the making of any gift, of any public money or thing of value

to any individual, municipal or other corporation whatever; . . . . "

As of this time, the trial judge has not found it necessary to rule the defense of consent unavailable to the petitioner in the instant case. Respondent has relied on this rule of law in conducting the prosecution of the instant matter, both at trial and before the grand jury. In the former proceeding the trial court ruled that the evidence proffered by the petitioner was insufficient to show consent and was, thus, irrelevant. In the latter proceeding, although the trial court received evidence on the issue of consent which was allegedly exculpatory, it chose to deny petitioner's motion to dismiss the indictment on procedural grounds.

The lack of merit of petitioner's claim of federal constitutional error is a part of the record. Respondent respectfully suggests to this Court that the California appellate courts should be given an opportunity to review the entire record and decide whether respondent's contention that the unavailability of the defense of consent to the petitioner is a separate ground for sustaining the ruling of the trial court.

The alleged wrongdoing of the District Attorney before the grand jury may not be considered a question of a deliberate attempt on the part of the prosecutor to charge an innocent citizen with an unfounded charge. Rather it is a dispute between the parties in the matter as to questions of law and fact. The California Supreme Court has imposed a duty upon all California prosecutors to advise a grand jury of evidence which *reasonably* tends to negate guilt. *Johnson v. Superior Court, supra,* at page 255. The federal system recognizes no such obligation on the part of the prosecution. *United States v. Hata* (1976) 535 F.2d 508, 512. Grand jury proceedings are ex parte investigations to determine whether criminal proceedings should be instituted, not mini-trials. *United States v. Calandra* (1974) 414 U.S. 338, 343-344, 38 L. Ed. 2d 561, 94 S. Ct. 613; *United States v. Dionisio* (1973) 410 U.S. 1, 16-17, 35 L. Ed. 2d 67, 93 S. Ct. 764.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CECIL HICKS, District Attorney
County of Orange, State of California

MICHAEL R. CAPIZZI
Assistant District Attorney

ORETTA D. SEARS
Deputy District Attorney
Head, Writs and Appeals Section

By: GARY P. RYAN
Deputy District Attorney

Attorneys for Respondent

INDEX TO APPENDIXES

		Page
"A"	California Constitution, Article I § 14	1
"B"	California Penal Code § 1237	2

California Constitution Article I § 14

Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant's request read the complaint to the defendant. On the defendant's request the magistrate shall require a peace officer to transmit within the county where the court is located a message to counsel named by defendant.

A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.

(California Constitution, Article I § 14, Deering's Annotated Articles, pg. 55, 1976 Pocket Supplement)

APPENDIX "B"

California Penal Code § 1237

An appeal may be taken by the defendant:

1. From a final judgment of conviction except as provided in Section 1237.5. A sentence, an order granting probation, or the commitment of a defendant for insanity, or the indeterminate commitment of a defendant as a mentally disordered sex offender shall be deemed to be final judgment within the meaning of this section. The commitment of a defendant for narcotics addiction shall be deemed to be a final judgment within the meaning of this section 90 days after such commitment. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.

2. From any order made after judgment, affecting the substantial rights of the party.

(California Penal Code § 1237, Deering's Annotated Articles, pg. 107)

STATE OF CALIFORNIA)
)
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on NOVEMBER 24, 1976, I served the within BRIEF FOR RESPONDENT IN OPPOSITION (NO. 76 - 326 - UNITED STATES SUPREME COURT) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

EVELLE YOUNGER, Attorney General
State of California
Bank of America Plaza
110 West "A" Street
San Diego, California 92101

W. E. ST. JOHN, Clerk
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. FRANK DOMINICHINI
Judge of Orange County Superior Court
34 Civic Center Plaza
Santa Ana, California 92701

JOHN P. McNICHOLAS
MORGAN, WENZEL & McNICHOLAS
1545 Wilshire Blvd., Suite 800
Los Angeles, California 90017
(2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOVEMBER 24th, 1976, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

ORIGINAL and FORTY COPIES FORWARDED TO
CLERK
UNITED STATES SUPREME COURT
WASHINGTON, D. C. 20543

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161